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DePaul Law Review

Volume 24
Issue 1 *Fall 1974*

Article 7

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William L. Niro

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Recommended Citation

William L. Niro, *New Challenges to Newspaper Freedom of the Press - The Struggle for Right of Access and Attacks on Cross-Media Ownership*, 24 DePaul L. Rev. 165 (1974)
Available at: https://via.library.depaul.edu/law-review/vol24/iss1/7

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NEW CHALLENGES TO NEWSPAPER FREEDOM OF THE PRESS—THE STRUGGLE FOR RIGHT OF ACCESS AND ATTACKS ON CROSS-MEDIA OWNERSHIP

Since the first publication appeared 284 years ago,[1] the American newspaper has occupied a position as one of America's most controversial social institutions. From its rudimentary beginnings in 1690 through nearly three centuries of development and growth, the American newspaper has survived as the essential element of a free society. The debate and controversy over the role of this institution continues to rage today in forms not unlike those surrounding its beginnings.

Colonial newspapers struggled for their existence under continuous attack from governmental officials, yet survived to become a profound influence on the nation's formation.[2] During the past decade the American press has experienced the most persistent assault in its history—not only directly from the executive branch of the government but also indirectly from Congress, the Federal Communications Commission and the Justice Department. The relentless attacks of Presidents Johnson and Nixon[3] on the press parallel the heated and often brutal attacks levied against newspapers by Thomas Jefferson during his tenure as President.[4] The pioneer spirit which pervaded the colonial press, and the

1. The first attempt at printing a colonial American newspaper was made in 1690 by a refugee journalist and bookseller from London named Benjamin Harris. Harris' first issue of a proposed Boston weekly, *Public Occurrances, Both Foreign and Domestick* [sic] was immediately banned by the colonial governor and council for its frank reporting and indirect criticism of the authorities.

2. The press' power to influence events in the nineteenth century increased to a point that prompted English historian Thomas Macaulay to label it the "fourth estate of the realm." *See* E. HUDON, FREEDOM OF SPEECH AND PRESS IN AMERICA (1963); S. KOBRE, THE DEVELOPMENT OF THE COLONIAL NEWSPAPER (1944); L. LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON (1966); J. TEBBEL, COMPACT HISTORY OF THE AMERICAN NEWSPAPER (1963).

3. For a detailed outline of specific overt and covert attacks on freedom of expression *see* Kranz, *Count One For Impeachment: Nixon v. The First Amendment*, 3 HUM. RIGHTS 173 (1973); Catledge, *Historic Confrontation Between Government and Press, Alive and Well Thanks to Watergate*, 20 LOYOLA L. REV. (N. ORLEANS) 1 (1974).

4. While Jefferson championed the cause for the inclusion of an express declaration ensuring freedom of the press in the Constitution and campaigned for its inclusion in 1791, he distrusted the newspapers and often commented on their al-

first amendment have served as the greatest shields against both governmental and private assaults on the press. Yet today, new and more sophisticated issues are being raised which directly challenge the role of newspapers in a modern society and pose the most serious threat to their first amendment guarantees. The basic questions presented are: Can the American public have a right of access and reply in the nation's newspapers without abridging the fundamental constitutional guarantee of freedom of the press?[5] Would such a statutory right of reply implement or restrain freedom of the press? Does the first amendment of its own force provide any right of access and reply to the public, especially in light of the media's present status as a large political, social, and economic institution?

These questions arise from a 1973 decision of the Florida Supreme Court recently reversed in a unanimous decision by the United States Supreme Court.[6] In *Tornillo v. Miami Herald Publishing Co.*[7] the Florida Supreme Court held the state's right of reply statute constitutional as implementing and furthering the guarantees of freedom of the press, stating that the first amendment guarantee of freedom of expression did not create a privileged class which, through a monopoly of the instruments of the newspaper industry, would be able to deny the people the freedom of expression which the first amendment guarantees. The *Tornillo* decision thus constituted a direct challenge to the traditional notions of a free press and the first amendment. The collateral non-first amendment issues touched off by *Tornillo* involve the entire news media and its status in twentieth century America.[8]

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leged inability to print the truth. *See* A. KOCH & W. PEDEN, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 81, 82, 581-82 (1944); L. LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 352-54 (1966).

5. The first amendment to the United States Constitution provides in part that: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." Gitlow v. New York, 268 U.S. 652 (1925) held the first amendment applicable to the states through the fourteenth amendment. "For present purposes we may and do assume that freedom of speech and the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Id.* at 666.

6. 94 S. Ct. 28-31 (1974).

7. The circuit court opinion appears at 38 Fla. Supp. 80 (1972); the Florida Supreme Court opinion appears at 287 So.2d 78 (Fla. 1973).

8. Media monopoly and the concentration of media power in the chain newspapers, national wire services and one newspaper towns, coupled with cross-ownership of newspaper, television, radio and cable TV interests has raised the fear that the press has became noncompetitive, enormously powerful and extremely influential in its ability to manipulate popular opinion. *See* TWENTIETH CENTURY FUND, A FREE AND RESPONSIVE PRESS (1973).

The first amendment, once thought to be impregnable protection for the press, is being viewed in a different light since the recent trend toward monopolization of the media and its evolution as a multibillion dollar industry. The concentration of media power and its effect on a truly free press are important considerations presented by *Tornillo*. Despite the United States Supreme Court decision holding the Florida right of reply statute unconstitutional, the monopoly and media concentration issues will remain in the forefront of the controversy.

Recent historical confrontations have taken place between the media and the government in both the "Pentagon Papers Case" and the "Selling of the Pentagon" controversy.[9] Considering the strong attitudes toward free expression on both sides of the issue, it is possible to demonstrate that the first amendment, as understood today, is radically different from what it was envisioned to be at its inception. The changing nature of the media and the conflict between the goal of free expression and other societal and governmental aims have combined to create difficulties in the application of the first amendment to contemporary circumstances and purposes. To understand these difficulties it is essential to discuss briefly the context of the first amendment's enactment in 1791 and the evolution of the newspaper industry.

The first amendment contains the most important elements of individual freedom. Freedom of the press has long been cherished as the right indispensable to personal liberty and inseparable from the concept of self-government. In its early beginnings the American newspaper, a crude one or two page document usually owned, edited and published by one person, served only a handful of people in the colonial community and had minimal effect on events outside that community. The ruling classes of Europe had seen the printing press as a threat to their power and successfully kept it under strict control. In America, the printer gradually became an ally of the thinkers and writers who struggled for religious and intellectual freedom as well as political power and eventually gained enough freedom and importance to play a crucial role in the formation of the United States.[10] Over the heated dissent of many of the

9. The "Pentagon Papers Case" is New York Times Co. v. United States, 403 U.S. 713 (1971). The "Selling of the Pentagon" controversy arose in the spring of 1971 after the Columbia Broadcasting System aired a documentary critical of the U.S. military establishment and the Pentagon's efforts to conceal vital information from the American public during the war in Southeast Asia. Congressman Harley Staggers, chairman of the Special Investigations Subcommittee of the House Commerce Committee subpoenaed CBS to present all films, tapes and notes used in the production of the documentary. The House refused to vote a citation for contempt of Congress relieving CBS of the obligation to produce the documents.

10. The first continuously published colonial weekly was the *Boston News-Letter*, printed by John Campbell in 1704. Campbell voluntarily submitted to ad-

framers, the Constitution was ratified in 1787 without a Bill of Rights enumerating individual liberties.[11] A growing public demand for specific limitations on federal interference with free expression led to the drafting of the first amendment to the Constitution. Freedom of the press became law with state ratification of the first ten amendments in 1791. Individual newspapers thereafter began to serve as semi-official vehicles through which a political party either presented its views or berated its opponents. The majority of editors envisioned their jobs as providing opportunities to express in print their partisan views on controversial issues, in addition to engaging in strictly moneymaking ventures.[12] Political feuds were carried out by such notables as George Washington, Thomas Jefferson, John Adams, Ben Franklin, Alexander Hamilton and others who either formed or helped finance newspapers to pronounce partisan stands and to further their own goals. The fact that the press survived this period indicated a basic public understanding of the principle of a free press. Even Thomas Jefferson, who castigated the press during his Presidency, stressed that self-government was based on an informed public, and, if forced to choose, "he would prefer newspapers without government, rather than a government without newspapers."[13] Both formal and informal governmental pressures were, however, continually present and repression of the fundamental freedoms was attempted.

In 1798, only seven years after the adoption of the first amendment, the Sedition Act was enacted by the Congress. The Act[14] provided, *inter alia*, that if any person should write, print, utter or publish, or cause or procure to be written, printed, uttered or published any false, scandal-

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vanced censorship from authorities and used the legend "Published by Authority." *See* E. EMERY, THE STORY OF AMERICA AS REPORTED IN ITS NEWSPAPERS FROM 1690 TO 1965, at 1 (1965). It was not until 1721 that the rebellious *New-England Courant* was published in defiance of governmental authority. The right to criticize governmental authority was not firmly established, however, until 1735 in the trial of John-Peter Zenger for seditious libel allegedly printed in his *New York Weekly Journal*. Zenger's acquittal opened the way for greater public criticism of authority and started an era which culminated in the American Revolution and the subsequent formation of the United States. Newspapers in that era flourished. "Their numbers grew from 12 in 1740 to 48 in 1795; cities such as Boston had as many as eight newspapers. Newspaper editors, for a variety of reasons, were often the self-appointed trend setters of the day, making use of their ability to clearly state and circulate a position." *Media and the First Amendment in a Free Society*, 60 GEO. L.J. 867, 879 (1972).

11. *See* I. BRANT, THE BILL OF RIGHTS, ITS ORIGIN AND MEANING 39 (1965).

12. E. EMERY, THE PRESS AND AMERICA 68 (1962).

13. 14 THE WRITINGS OF THOMAS JEFFERSON 359 (P. Ford ed. 1892-1899).

14. Act of July 14, 1798, 1 Stat. 596, 597.

ous and malicious writing against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame or to bring them into contempt or disrepute, or to excite the hatred of the good people of the United States against them, would be punished by a maximum fine of $2000 and two years imprisonment. The Sedition Act was the tool of the majority Federalist Congress who supported England and sought to restrain the Republicans and their leader, Thomas Jefferson, from using the press to align America with France in the imminent conflict between France and England.[15] At the root of the conflict were two divergent views of first amendment freedoms. Hamilton maintained a narrow and limited view (parallel to Blackstone's) seeking to punish the publication of improper, mischievous or illegal materials. The legislatures of Kentucky and Virginia, under the guidance of Jefferson and Madison, maintained a different view and denounced the Act as an unauthorized expansion of the federal government's powers arguing that the federal government could make *no* law abridging liberty of speech and the press under a strict construction of the first amendment.[16]

The Sedition Act, which was never reviewed by the Supreme Court but expired of its own volition, was the initial breach in what would become a persistent flow of challenges to the meaning and extent of first amendment protections. The result of this early confrontation was a rather calm period for newspapers establishing the premise that every person's right to speak, write and print his opinion upon any subject was tempered only by laws against injury to another person's rights, person, property or reputation. American newspapers thus had passed through a most crucial period and moved into the 1800's with a newly established, broadly based freedom of expression. The period from 1800 to 1900 marked an expansion of the concept of a free press as the United States began its westward expansion and industrialization. "In 1800 there were 235 newspapers, including 24 dailies; by 1800 there were 512 papers including 42 dailies. These were the survivors of 2,120 different papers started between 1690 and 1820."[17]

Today, the American newspaper has grown to become a multibillion dollar industry, a situation hardly conceived by the framers of the Bill of

15. E. HUDON, FREEDOM OF SPEECH AND PRESS IN AMERICA 45 (1963).

16. *Id.* at 47. Widespread resentment against the Federalist party and the Alien and Sedition Laws burst forth as soon as the contents of the laws became generally known.

17. E. EMERY, *supra* note 10, at 19.

Rights. The modern press' continuing trend toward bigness and commercialism directly supports those favoring the rights of access and reply, and strongly influences the shift from the traditional application of first amendment law to the press.[18]

Bigness and the evolution of multi-media ownership has initiated a wave of concern over media monopolies.[19] The United States Department of Justice Antitrust Division has studied the media situations in Chicago, where 70 percent of the local television, radio and newspaper advertising go to two corporations; in St. Louis, where two newspaper companies and their affiliated radio and TV stations collect 80 percent of the advertisement dollars; and in Des Moines where Cowles Communications, Incorporated, owns all the newspapers and major AM, FM and television stations accounting for 100 percent of newspaper advertising revenue and 37 percent of TV advertising revenue.[20] Very little has been done, however, to correct these concentrations of ownership which have become a dominant fact of press and broadcasting operations in this country. The existing antitrust laws,[21] even assuming their enforcement

18. In its peak year of 1909, there were nearly 2,400 daily newspapers with 689 cities having competing dailies. Today there are 1,728 American dailies with only 42 cities served by a competing newspaper under separate ownership. Total daily circulation is nearly 62 million copies with yearly advertising revenues of over 6.5 billion dollars. *See* 1974 WORLD ALMANAC AND BOOK OF FACTS 766-67 (1974). This trend toward bigness has increased skepticism that as the broad base of ownership narrows the variation of facts and opinions received by the public from "antagonistic" sources becomes increasingly limited. Coupled with the trend toward few but bigger owners is the shift toward inter-media ownership. For example, 68 cities have a radio station owned by the only local daily newspaper and 160 television stations have newspaper affiliations. EDITOR & PUBLISHER, Apr. 4, 1970, at 6.

19. The American Newspaper Publishers Association reported in 1970 that 96 television and 300 radio stations worth almost 2 billion dollars were owned by companies operating newspapers in the same geographical area. *Congress, FCC Consider Newspaper Control of Local TV*, CONG. Q., Mar. 16, 1974, at 659. *See also What to do About Multimedia Holdings: FCC Begins Debate*, BROADCASTING, Aug. 5, 1974, at 23; *The Hard Choices FCC Now Confronts on Crossownership*, BROADCASTING, Aug. 5, 1974, at 23-26; Dorfman, *Media Monopoly and What It Means to You*, THE CHICAGOAN, Mar. 1974, at 94; Pincus, *Media Monopolies*, THE NEW REPUBLIC, Jan. 26, 1974, at 13; Barnett, *Merger, Monopoly & a Free Press*, THE NATION, Jan. 15, 1973, at 76; Maher, *New Developments in the FCC's "One-To-A Customer Proceeding,"* 10 IBFM NEWSLETTER, July 12, 1971, at 1.

20. Dorfman, *supra* note 19, at 94; CONG. Q., *supra* note 19, at 659. A technical economic study of newspaper-television industry structure and pricing behavior conducted by Stanford University Professor Bruce M. Owen confirms empirically that the monopoly in media ownership is indeed resulting in monopolistic advertisement prices. Owen, *Newspaper and Television Station Joint Ownership*, 18 ANTITRUST BULL. 787, 807 (1973).

21. *See* Sherman Antitrust Act, 15 U.S.C. §§ 1 *et seq.* (1970); Clayton Act, 15 U.S.C. §§ 12 *et seq.* (1970). Since the 1950's the United States Justice Department

by the Justice Department against the media, would have little effect on media concentration.[22] The antitrust laws do not apply to the chains, since their newspapers are in different cities, and they do not reach newspaper monopolies unless the monopoly is created or maintained in restraint of trade. Their impact on newspaper-television-radio combinations at the local level has never been tested. The Federal Communications Commission, although in possession of broad powers to deal with inter-media ownership,[23] has failed to adopt any rules or regulations divorcing ownership of daily newspapers and television stations in the same city. Although there are no current regulations which prohibit or limit a newspaper from owning television and radio stations, a Commission proposal[24] is currently pending that would directly affect newspaper cross-ownership.

Naturally, any governmental intervention attempting to reshape or regulate the newspaper "industry" must proceed cautiously to avoid conflict with the first amendment. If governmental action is taken, it must protect *all* of the competing first amendment interests. The framers of the Bill of Rights believed that a free flow of information and ideas

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has been the main advocate for an FCC rule concerning cross-ownership asserting that cross-ownership violates antitrust policy. The Department looks mainly to the economic issues of broadcasting seeking only to preserve a competitive market. The Department has escalated pressure for an FCC rule against cross-ownership by filing petitions with the FCC to deny broadcast licenses held by several newspaper interests. *See* CONG. Q., *supra* note 19, at 661-62. Some commentators argue that the Newspaper Preservation Act, 15 U.S.C. §§ 1801-04 (1970), which partially exempts some newspaper activities from the antitrust laws does nothing to reverse the trend toward consolidation of the press and, in fact, promotes monopolistic practices. *Media and The First Amendment in a Free Society*, 60 GEO. L.J. 867, 899-902 (1972). *See also* J. BARRON, FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA (1973).

22. Media concentration is the degree to which cross-ownership permits one owner to dominate either the flow of information or advertising sales in a market area. Cross-ownership occurs when a company owns more than one type of media outlet in a service area. The FCC regulates cross-ownership generally by adopting rules to define how much cross-ownership it will allow. Concentration may or may not imply possible violation of antitrust laws. *See* CONG. Q., *supra* note 19, at 659; Bennett, *Media Concentration and the FCC: Focusing With a Section Seven Lens*, 66 NW. U.L. REV. 159 (1971).

23. *See, e.g.*, FCC Multiple Ownership Rules, 47 C.F.R. §§ 73.35, 73.240, 73.636 (1973). In the 1940's the FCC encouraged newspaper owners to pioneer the development of television by approving broadcast licenses to newspapers already in control of major portions of media advertising and readership in a single community. Publishers argue it would be unfair punishment to force them to divest their broadcast interests solely because they own newspapers. P & F RADIO REG. 53:184b-184n. *See also* CONG. Q., *supra* note 19, at 660-61; Barnett, *supra* note 19, at 76; Bennett, *supra* note 22.

24. FCC Docket No. 18110 (Apr. 6, 1970), P & F RADIO REG. 53:181-184n.

was the best protection against the worst form of tyranny—government control of speech and the press. They felt that the uncensored publication of thought stimulated discussion of public affairs and was essential to the proper functioning of a democratic society.[25] In protecting the public, the first amendment also protects the individual publisher without regard to whether he publishes items pleasing or displeasing to the government. The attacks on these principles have steadily increased over the past ten years, reaching their pinnacle with former Vice President Spiro Agnew's campaign to discredit the news media. Attacks by former President Nixon and his press secretary, Ronald Zeigler, on the *Washington Post* and the *New York Times* seemed to favor an eighteenth century concept of newspaper coverage—The *Boston News-Letter* of 1704 "*Published by Authority.*" Fortunately, the first amendment looms much larger than either man or his office.[26]

What has evolved from this 284 year history of the newspaper industry is a system of freedom of expression solidly grounded in the first amendment yet tainted by the reality of a multibillion dollar newspaper industry which encompasses control over both the printed and broadcast media. At its inception, the first amendment was passed primarily to keep expression free from governmental interference and to assure individual freedom. The goal today appears to be the promotion of a broad public function, that is, fuller expression of ideas and divergent views, and a forum for individuals and groups to express their opinions and ideas on issues of public concern. In a nation this size, however, few citizens are able to utilize the newspaper as a forum. Zechariah Chafee, Jr., the first great scholar on the first amendment, stated that

> [t]he First Amendment protects two kinds of interests in speech. There is an individual interest, the need of many [people] to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way.[27]

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25. *See Media and the First Amendment in a Free Society*, 60 GEO. L.J. 867, 871 (1972).

26. In March, 1974, President Nixon had urged Congress to enact right of reply legislation to reaffirm certain private rights of public figures so that people interested in running for public office could have greater assurance of recourse against slanderous attacks on themselves or their families. Interestingly, in his March 19, 1974 press conference at the National Association of Broadcasters Convention, the President responded to a question concerning treatment of him by the press by stating that "there is always an adversary relationship between the President and the press—that is healthy, that is good." 10 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Mar. 25, 1974, at 341.

27. Z. CHAFEE JR., FREE SPEECH IN THE UNITED STATES 33 (1954).

Traditionally, the press has operated in the classic laissez-faire pattern. There are no characteristics in newspaper publishing that *inherently* demand government regulation. This is in direct contrast with the broadcast media and governmental control.[28] In terms of substantive impact, government regulation of the press is less likely to promote the system of free expression and more likely to be repressive. This is mainly due to the newspaper's long standing position as an entity free from any type of special governmental control. Broadcast media, in its relatively short existence, has always been under government regulation justified by a theory of limited airwaves while newspapers have enjoyed the utmost first amendment protection from both governmental[29] and private interference in the courts.[30]

It is against this background that a new challenge was thrust toward the newspaper industry and the first amendment guarantee of freedom of the press. In 1973 the Supreme Court of Florida had upheld the constitutionality of Florida's right of reply statute[31] in the face of a challenge by the Miami Herald Publishing Company.[32] This case typifies the problems presented in a dispute between a large corporate-owned newspaper and a state political candidate in his quest to have access and reply to newspaper editorials attacking his fitness to hold public office. While the issues presented to the United States Supreme Court were nar-

28. *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 653-67 (1970). *See also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.C. Cir. 1971), *aff'd mem., sub nom.*, Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972).

29. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971).

30. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *But see* Gertz v. Robert Welch, Inc., 94 S. Ct. 2997 (1974).

31. FLA. STAT. ANN. § 104.38 (1972). Section 104.38 provides:

> Newspaper assailing candidate in an election; space for reply—If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083.

32. The United States Supreme Court by a unanimous decision overturned the Florida Supreme Court decision and held Florida's right of reply statute unconstitutional as an abridgment of the first amendment guarantee of freedom of the press. 94 S. Ct. 2831 (1974).

row, the potential ramifications of this case were understandably quite broad. Perhaps more interesting than the pure first amendment issues is the relationship the newspapers bear to the public interest and the degree of editorial integrity that is maintained in the face of large corporate ownership of the newspaper and its ultimate effect on the interpretation of the first amendment issues before the Court.

The challenge arose when Patrick L. Tornillo, Jr., a candidate for the Florida legislature, requested that the *Miami Herald* print verbatim his replies to two *Herald* editorials as required by section 104.38 of the Florida statutes. The *Herald* refused to comply and Tornillo instituted a civil suit for declaratory and injunctive relief plus punitive damages. On October 20, 1972, the Circuit Court for Dade County dismissed the complaint, holding that section 104.38 violated the first and fourteenth amendments to the United States Constitution and Article I of the Florida Constitution. On direct appeal to the Florida Supreme Court, that court reversed[33] the circuit court decision and upheld the constitutionality of section 104.38 stating that the Florida right of reply law did not interfere with freedom of the press as guaranteed by the Florida Constitution and the Constitution of the United States. The court stated that the statute was not only *consistent* with the constitutional guarantee of freedom of the press but *strengthened* and *implemented* that guarantee. The point brought sharply into issue by this interpretation is whether the first amendment acts as a sword as well as a shield, imposing obligations on the press as well as protecting them from government regulation. Certainly this view would seem acceptable in the wake of the media's overwhelming power in today's world. At the heart of the matter, however, is the issue of whether a provision for access and reply would achieve the status of a "New First Amendment Right."

The access argument, in its most direct form, questions the basic structure and purpose of the American press. Professor Jerome Barron, the foremost access advocate, sees in the newspapers and in our law a failure to provide any right of public access for expression of ideas.[34] Barron sees the law as designed to protect speakers and writers from the fury of either

33. 287 So. 2d 78 (Fla. 1973).

34. *See* Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); J. BARRON, FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA (1973). Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1968). An excellent review and assessment of the access question can be found in Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media; A Critical Review and Assessment*, 52 N. CAR. L. REV. 1 (1973). See especially footnote 5 for an exhaustive survey of literature inspired by the access issue.

the mob or the state—those who somehow had managed to express themselves. In advocating a positive interpretation of the first amendment which would *require* access to the media, Barron visualizes this as a rational approach to the difficult task of penetrating the media in a serious way. The suggestion that the Constitution requires, let alone permits, the imposition of affirmative obligations on the press runs counter to the grain of traditional constitutional theory. The role of private censorship was never considered by the framers. Yet this is exactly the import of *Tornillo.* The Miami Herald, a private enterprise, denied Tornillo's attempt to have his replies printed in their paper. The first and fourteenth amendments prohibit both federal and state governments from abridging the freedom of the press, that is, the Constitution prohibits the government from *restraining* or *censoring* a publication.[35] The Constitution has never been interpreted as prohibiting the government from *compelling* a publication. Tornillo had asserted that the Florida statute was essential to providing him and others similarly situated with a means of publicly expressing their political views. The Florida Court cited *Pennekamp v. Florida*[36] in emphasizing that the power of the press must be tempered with responsibility:

> Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society. The scope and nature of the constitutional protection of freedom of speech must be viewed in that light and in that light applied. . . . A free press is vital to a democratic society because freedom gives it power. Power in a democracy implies responsibility in its exercise.[37]
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> The press does have the right, which is its professional function, to criticize and to advocate. . . . But the public function which belongs to the press makes it an obligation of honor to exercise this function only with the fullest sense of responsibility. Without such a lively sense of responsibility a free press may readily become a powerful instrument of injustice.[38]

Citing *Associated Press v. United States*[39] the Florida Court continued that the first amendment

> rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the

35. *See* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); New York Times Co. v. United States, 403 U.S. 713 (1971); Time, Inc. v. Hill, 385 U.S. 374 (1967); Mills v. Alabama, 384 U.S. 214 (1966); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971).

36. 328 U.S. 331 (1946).

37. *Id.* at 354-56 (Frankfurter, J., concurring).

38. *Id.* at 365 (Frankfurter, J., concurring).

39. 326 U.S. 1, 20 (1945).

> public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. . . . Freedom of the press from governmental interference, under the First Amendment does not sanction repression of that freedom by private interests.[40]

Professor Barron sees the right of access and reply to newspapers solidly based in the first amendment and parallels it with the Federal Communications Act's "fairness doctrine"[41] which applies to the broadcast media. This argument assumes that the first amendment was enacted to basically ensure that *both* the individual's right to speech *and* the individual's right to be presented with both sides of controversial matters are protected. While it can be said with confidence that the first amendment guarantees the individual's right to free speech and press, it is questionable that it ensures the individual's right to be presented with views on both sides of controversial matters. After all, if one wants his views on an issue heard he can always start his own newspaper. In 1791 that was a simple task. In 1974, however, the cost prohibits an individual or group from expressing their "side" of an issue to the same audience as a large newspaper.[42] Yet a strict interpretation (an absolutist's view) would still say that the government can make *no* law abridging (whether it be by restraining *or* compelling publication) the individual's right to print what he pleases. Surely no one would contest the merit of this argument in 1791 when it was easy to print a reply. The argument loses its strength when viewed against the current status of the newspaper industry. The move toward monopolization brings on a corresponding tendency of the press to become exclusive in its observation, which, in turn, deprives the public of their right to know both sides of controversial matters. The main thrust of the Supreme Court's opinion in *Tornillo* was directed to that issue. "The abuses of bias and manipulative reporting are . . . said to be the result of vast accumulations of unreviewable power in the modern media empires."[43] The solution, as Barron asserts, to effectively ensure fairness and accuracy and to provide for press accountability is for the government to take affirmative action.

Framed in a more practical way, the fundamental issue the Court was to consider was whether the editorial discretion of newspapers may be

40. 287 So. 2d 78, 83 (Fla. 1973).

41. 47 U.S.C. § 315 (1970). *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

42. *But see* Ben-Hourin, *The Alternative Press, Journalism as a Way of Life*, THE NATION, Feb. 19, 1973, at 238.

43. 94 S. Ct. 2831, 2836 (1974).

constitutionally circumscribed by a government regulation which compels publication. In *Columbia Broadcasting System, Inc. v. Democratic National Committee*[44] the Court held that a broadcaster may not be forced to accept a paid political announcement, concluding that governmental intrusion upon the exercise of "journalistic discretion" to determine what should be published contravenes the "rigid limitations" of the first amendment. *Tornillo*, however, argued that under *New York Times v. Sullivan* the Court has recognized ". . . a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ."[45] However, this reading of *New York Times* must be construed quite liberally to suggest a right to access.

The Seventh Circuit Court of Appeals specifically addressed itself to the access issue in *Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune Co.*[46] when all four major Chicago newspapers refused to publish advertisements which presented the union's views on a labor dispute in which it was engaged:

> It is urged that the privilege of First Amendment protection afforded a newspaper carries with it a reciprocal obligation to serve as a public forum, and if a newspaper accepts any editorial advertisements it must publish all lawful editorial advertisements tendered to it for publication. . . . We do not understand this to be the concept of freedom of the press recognized in the First Amendment. The First Amendment guarantees of free expression, oral or printed, exist for all. . . . The Union's right to free speech does not give it the right to make use of the defendants' printing presses and distribution systems without defendants' consent.[47]

Other attempts to gain access have also been soundly defeated.[48] The major thrust of Tornillo's argument for a right of reply and access comes from the legal commentary of Professor Barron with some support from Thomas Emerson. In his highly regarded book, *The System of Freedom of Expression*, Professor Emerson indicates that a right of reply "would strengthen and vitalize" freedom of expression:

> It is sufficient to note that a right of reply could be made available in most situations in which an individual claims that false assertions (and other forms of attack on him) have been made. It is particularly applicable in

44. 412 U.S. 94 (1973). *See also* Resident Participation of Denver, Inc. v. Love, 322 F. Supp. 1100 (D. Colo. 1971).

45. 376 U.S. 254, 270 (1964); *see also* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

46. 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971).

47. *Id.* at 478.

48. *See, e.g.*, Mills v. Alabama, 384 U.S. 214 (1966); Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971); Avins v. Rutgers, State Univ., 385 F.2d 151 (3d Cir. 1967); Resident Participation of Denver, Inc. v. Love, 322 F. Supp. 1100 (D. Colo. 1971).

> the case of the press where abandonment of the libel action would be felt most. Such a procedure is the most appropriate and probably the most effective way to deal with the problem. The person attacked would have an opportunity to get his position and his evidence quickly before the public. He would have a forum in which to continue the dialogue, rather than being forced to withdraw to the artificial area of the courtroom. The discussion would thus be kept going in the marketplace, and the issues left up to the public, which must make the final decision anyway.[49]

Judicial recognition of the right to reply, however, does not exist. *Columbia Broadcasting* and similar cases firmly support the proposition that the decision of what to publish and what not to publish rests solely within journalistic editorial discretion which is protected by the first amendment against *any* intrusion by government.[50]

The Florida Supreme Court rationalized its decision and reconciled its holding with prior decisions by stating that the Florida statute did not constitute a prior restraint, since no specific newspaper content was excluded. Thus, they argued, compelling publication would not violate first amendment guarantees, but prohibiting or restraining publication would. Such a distinction in the interpretation of the first amendment has never been recognized by the courts. In fact, in *Associates & Aldrich Co. v. Times Mirror*, the Ninth Circuit Court of Appeals stated that "[t]here is no difference between compelling publication of material that a newspaper wishes not to print and prohibiting a newspaper from printing news or other material."[51]

The access argument of *Tornillo* therefore finds little support in either commentary, history, or judicial determinations. Most courts confronted with alleged improprieties or unfairness by the newspapers recognize that such instances give rise to a frustration which often compels otherwise peaceful citizens to engage in disruptive means to get their views aired. While Professor Barron's writings on the subject bring these frustrations into focus and suggest a detailed statutory solution to the problem, he devotes little time to the constitutional arguments which, in the

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49. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 539 (1970).

50. 94 S. Ct. 2831 (1974). *See also* Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations, 413 U.S. 376 (1973) where the Court commented that:

> Nor, *a fortiori*, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial.

Id. at 391.

51. 440 F.2d at 135. Most decisions rendered by the courts have tested various statutes which were restrictions upon publication. *See* note 48 *supra*.

last analysis, prove insurmountable. As desirable as the result may be, the courts are unable in good faith to reach it. Emerson has commented that:

> any effort to solve the broader problems of a monopoly press by forcing a newspaper to cover all "newsworthy" events and to print all viewpoints, under the watchful eyes of petty public officials, is likely to undermine such independence as the press now shows without achieving any real diversity. Government measures to encourage a multiplicity of outlets, rather than compelling a few outlets to represent everybody, seems a far preferable course of action.[52]

Thus, with most judicial decisions failing to recognize a first amendment right of access and reply and a reasonable fear that recognition of such a right may be the beginning of the demise of free speech and press, one must conclude that recognition of such a right at this time is not merited. Indeed the Supreme Court held, after discussing the arguments raised above, that:

> the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.[53]

The *Tornillo* litigation and the controversy surrounding Professor Barron's "access" arguments are merely the outward manifestations of deeper and far more pressing problems.[54] The mass media assumes many roles, one of which is to receive and digest criticism from political figures, social commentators and various members of the general public that they serve. An adversary relationship with government goes back as far as print, but during the past decade the infighting has escalated in degree and kind,

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52. *See* T. EMERSON, *supra* note 49, at 671.

53. 94 S. Ct. 2831, 2839-40 (1974). The Court noted in furtherance of its point that:

> [L]iberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper. A journal does not merely print observed facts the way a cow is photographed through a plateglass window. As soon as the facts are set in their context, you have interpretation and you have selection, and editorial selection opens the way to editorial suppression. Then how can the state force abstention from discrimination in the news without dictating selection? 2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 633 (1947).

Id. n.24.

54. *See* notes 18-26 and accompanying text *supra.*

especially during the Nixon administration. The role of modern newspapers has expanded from its traditional "watchdog of government" to one of maintaining an enlightened citizenry.

> Today, especially in their public appearances, publishers and broadcasters commonly speak of "the public's right to know" and the "responsibility of the press." What this amounts to is a shift in the theoretical foundation of freedom of the press from the individual to society. What was once looked upon as a universal, personal right to free expression is now described in terms of public access, of the right to know.[55]

Thus the idea of fairness, not included in the founding fathers' philosophy, has evolved to shift the emphasis from individual expression to one of public access. Idealistically the "open marketplace" concept of truth's ultimate victory[56] was sound in 1791, but in the monopolistic phase of an intensely commercial and technological society can we be sure that it actually works this way? The determinative question is how well does the press carry out its "responsibilities to the public"? As seen earlier, in 1791 the responsibility most newspapers had was to themselves—essentially they were self-serving. The arrival of "bigness" to newspapers has seen a corresponding growth in public distrust over journalistic sins excused in the name of freedom of the press. For instance, biased publishers and editors have been accused of slanting or deleting their coverage of certain individuals or groups against whom they have personal vendettas or those whom they feel unnewsworthy. "Slanting almost never means prevarication. Rather it involves omission, differential selection, and preferential selection, such as 'featuring' a pro-policy item [or] 'burying' an anti-policy story in an inside page. . . ."[57] News quarantines—exclusion of subjects from news columns because they produce harmful effects—fall under the editorial discretion that must be the right of every editor. These practices

> are considered a sign of one of the enlightened developments in American journalism, the idea of social responsibility in the press. At the same time, they are often indistinguishable from less attractive practices, such as special treatment of sacred cows or suppressions for the benefits of friends of the paper. But even when quarantines are altruistically imposed, they interfere with the democratic process and are demoralizing to the discipline of news judgment.[58]

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55. T. PETERSON, J. JENSEN, & W. RIVERS, THE MASS MEDIA AND MODERN SOCIETY (1965) *cited in* H. KREIGHBAUM, PRESSURES ON THE PRESS 46 (1972).

56. John Milton in his famous *Areopagitica* expressed the concept that " . . . who ever knew Truth put to the worse, in a free and open encounter."

57. Breed, *Social Control in the News Room, reprinted in 1967 Hearings on S. 1312*, pt. 4, at 1637. *See also* Donohew, *Newspaper Gatekeepers and Forces in the News Channel*, PUB. OPINION Q., Spring, 1967, at 61.

58. B. BAGDIKIAN, THE EFFETE CONSPIRACY AND OTHER CRIMES BY THE PRESS 41-42 (1972). Bagdikian cites instances of suppressed coverage of activities of the

The suit by the Chicago Joint Board, Amalgamated Clothing Workers Union against the four Chicago dailies[59] specifically raises the suspicion of corporate influence upon what editors publish.

The defendant newspapers, two of which are owned by Field Enterprises, refused to publish an advertisement entitled "You Bet We're Picketing Marshall Field & Co." The advertisement protested the retailer's expanding sales of clothing produced overseas by 14 and 15 year old girls paid as little as 8 cents an hour.[60] Field Enterprises, which coincidentally holds controlling interest in Marshall Field & Company, a large Midwestern retailer, refused the advertisement on the grounds that it did not meet their "Advertising Acceptability Code" which states that they do not accept advertising which, "in its judgment, contains attacks of a personal, racial or religious nature, or which reflects unfavorably on competitive organizations, institutions, or merchandise."[61] Yet shortly thereafter the same Chicago dailies published full page advertisements by a Construction Employees Association which accused a black organization of job discrimination.[62]

The directors of American newspapers thus exercise a powerful form of private censorship—a censorship traditionally associated with government and which forms the basis for the first amendment protection from restraints on freedom of speech and of the press. The decision not to publish is characterized as an exercise of freedom of choice, freedom of expression or editorial discretion. This position assumes that there are enough publishers so that any idea can be published somewhere. In Chicago, as in numerous other metropolitan areas, however, one or two corporations have the power to effectively shut off access to the daily press.[63] These isolated instances of media censorship are by no means exclusive of other instances in other cities—it is merely one of many al-

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American Nazi Party and suppression of racially oriented news. "Not so long ago most Southern dailies had a quarantine in their general news columns on any items that made blacks look good or normal." *Id.*

59. 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); *see* note 46 and accompanying text *supra.*

60. *See* Chapter 2 entitled *Freedom of the Press—Chicago Style* in J. BARRON, FREEDOM OF THE PRESS FOR WHOM? 13 (1973).

61. *Id.* at 14.

62. *Id.* at 15.

63. The Chicago Tribune Company, publisher of the *Chicago Tribune* and *New York Daily News* and five other dailies, leads all newspaper groups with a total circulation of over 3.6 million or approximately 6 percent of the total United States weekday circulation. H. KRIEGHBAUM, PRESSURES ON THE PRESS 165 (1972).

leged "crimes by the press."[64] Hence, the free flow of ideas, while in principle a fundamental articulated goal of American newspapers, passes through a series of diversion channels which could be labelled as private censorship.

The import is that to effectively operate in both the public's and their own interest within a twentieth century interpretation of the first amendment guarantee of a press free from censorship (governmental or otherwise), newspaper editors, publishers and their corporate owners must seek to maintain editorial integrity, or the responsibility to do so will be ultimately deferred to the legislatures and the courts. The displeasure with multi-media ownership and corporate concentration of newspaper ownership has surfaced with greater force than ever before and will surely gain support despite the ruling in *Tornillo*. The task presented by this situation is for the newspaper industry to undergo a period of self-evaluation in an effort to define its responsibilities and its relationship to a modern society. An effort similar to the "Commission on the Freedom of the Press,"[65] which took place in the late 1940's and early 1950's, is needed to examine press performance and outline specific guidelines to insure a free press that can be actively supported by the first amendment. The Commission warned that:

> No democracy . . . certainly not the American democracy, will indefinitely tolerate concentration of private power irresponsible and strong enough to thwart the aspirations of the people. Eventually governmental power will be used to regulate private power—if private power is at once great and irresponsible.[66]

Unfortunately, the Commission's report was not openly accepted by the press. However, the fact cannot be denied that control of the press, whether by government or private enterprise, conflicts with the public in-

64. *See* B. BAGDIKIAN, *supra* note 44; *The Free Press: How Free?*, 3 HUM. RIGHTS 93 (1973); J. BARRON, *supra* note 34.

65. COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS (1947). The Commission articulated the fundamental role for the press as one of conscious social responsibility and concluded that the press was not fulfilling that responsibility. The Commission concluded that it is the press' responsibility to provide:

1. a truthful, comprehensive and intelligent account of the day's events in the context which gives them meaning;
2. a forum for the exchange of comment and criticism;
3. the projection of a representative picture of the constituent groups in society;
4. the presentation and clarification of the goals and values of society; and
5. full access to the day's intelligence.

Id. at 20-29.

66. *Id.* at 80.

terest in receiving information and ideas. The public interest in having unrestricted access to information is "closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."[67] Justice Hugo Black, recognizing the threat posed by industry concentration and control, warned that the first amendment "does not afford non-governmental combinations a refuge if [newspapers] impose restraints upon that constitutionally guaranteed freedom."[68]

Certainly the owners of newspapers have a right to print what they please; and the first amendment has protected them from most challenges (both governmental and private) to that freedom. The traditional concepts of the first amendment are most appropriate when applied to a colonial press where the individual's right to print what he pleased was paramount. However, with the industrialization of the modern newspaper, the influence of large corporate ownership, the concentration of media ownership must be considered when defining their first amendment rights now and in the future.

The public interest in diverse journalism is now paramount. The need for a statutory, judicially recognized right of access is, however, questionable—at least at the present time.[69] The good sought by governmental establishment of rights of reply and access is overwhelmed by the potential evil to be wrought by this initial incursion into a fundamental constitutional freedom. The concentration of media ownership, if not managed properly to ensure independent editorial integrity and maintain a conscious social responsibility, will surely instigate public insistence on an articulated right of reply and access. If the modern newspaper industry is to continue to enjoy its protected status under the first amendment, it must take an active part in establishing and maintaining itself as a servant of the public, not its corporate owners. Certainly, a right

67. Associated Press v. United States, 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring).

68. *Id.* at 20.

69. Indeed, Justice White in his concurring opinion in *Tornillo* concluded that:

> Of course, the press is not always accurate, or even responsible, and may not present full and fair debate on important public issues. But the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed . . . . Any other accommodation—any other system that would supplant private control of the press with the heavy hand of government intrusion—would make the government the censor of what the people may read and know.

94 S. Ct. 2831, 2841 (1974).

of access to the press can be fashioned by the courts as a matter of first amendment interpretation. The fact that the first amendment can be read to grant protection to others in the opinion-making process as well as to those who own the communication media should be sufficient notice to the media that their rights are necessarily tempered by the needs of society.

*William L. Niro**

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* Mr. Niro, a member of the Illinois Bar, was Survey Editor of the *DePaul Law Review*, 1973-74.